No. 18271

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAIME J. MERINO,

Appellant,

vs.

THEODORE HOCKE, United States Commissioner,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from the order of the United States District Court for the Southern District of California, denying an application for a writ of mandamus and, in the alternative, an order, each providing for directions to United States Commissioner Theodore Hocke that he make an order authorizing the taking of depositions in Mexico by appellant for introduction in evidence in extradition proceedings and that he exercise his discretion in determining whether such an order should be granted.

The jurisdiction of United States Commissioner Hocke to hear extradition matters is based on said

Commissioner's Order of Appointment, dated February 28, 1959.

The jurisdiction of the District Court and said United States Commissioner was based upon Section 3184 of Title 18, United States Code, and the extradition treaty existing between the United States of America and the Republic of Mexico, ratification exchanged April 22, 1899, proclaimed April 24, 1899, as amended.

Appellant maintains that this court has jurisdiction to entertain this appeal and to review the order in question under the provisions of Sections 1291 and 1294, Title 28, United States Code.

II.

STATEMENT OF THE CASE.

On February 1, 1960, an extradition complaint was filed with the United States Commissioner, Los Angeles against appellant herein. On April 12, 1960, an amended complaint was filed, setting forth the basis for extradition proceedings, including the fact that appellant was not a citizen of the United States.

The amended complaint also alleged in essence that appellant had sought asylum in the United States and was in the United States and had been duly and legally charged with having committed in Mexico the crimes of embezzlement of public funds and falsification of official acts and uttering or fraudulent use of the same.

On April 25, 1960, appellant moved the United States Commissioner for the Southern District of California

for an order authorizing the taking of depositions of certain persons in Mexico. Said motion came on for hearing before the United States Commissioner on May 26, 1960, and was denied.

On July 7, 1960, appellant sought relief from the United States Commissioner's order denying the above-mentioned motion by filing an application for a writ of mandamus and, in the alternative, a motion for an order, before the United States District Court for the Southern District of California, Central Division. The application and motion were denied on July 12, 1960. Notice of Appeal was served by appellant on July 15, 1960. The appeal was dismissed by this Court on April 26, 1961, in *Merino v. Hocke,* 289 F. 2d 636 (9th Cir. 1961).

On December 27, 1961, appellant made the application for writ of mandamus and for an order which were denied on April 27, 1962, and are the subjects of the instant appeal. Notice of appeal was filed on April 27, 1962.

On June 12, 1961, Commissioner Theodore Hocke, Los Angeles, entered an order finding appellant extraditable. Appellant filed a Petition for Writ of Habeas Corpus on June 21, 1961. The United States District Court entered an Order Dismissing Writ of Habeas Corpus on April 3, 1963. Appellant filed notice of appeal from this order on April 11, 1963.

III.
ERROR SPECIFIED.

Appellant has specified the following points on appeal (Appellant's Opening Brief, Topical Index):

1. The Court erred in denying appellant's application in the nature of a writ of mandamus.

2. The Court erred in denying appellant's motion for an order.

3. The Court erred in failing to make an order to take depositions under a United States deposition statute.

4. The Court erred in determining that depositions were unavailable and in denying the right to take depositions "by way of a subpoena" under Title 18, United States Code, Section 3191.

5. The Court erred in determining that neither Rule 15, *Federal Rules of Criminal Procedure,* nor Rule 26, *Federal Rules of Civil Procedure,* was applicable to extradition proceedings.

6. The Court denied due process of law.

IV.
STATEMENT OF THE FACTS.

Basically, the case involves a proceeding for extradition of appellant, a Mexican citizen, from the United States to Mexico. Appellant contends that he should have had the opportunity to present certain evidence during the extradition hearing and that this should have been provided by an order by the United States Commissioner in Los Angeles, authorizing the taking of depositions of certain alleged witnesses in Mexico.

V.
ARGUMENT.

A. This Court Lacks Jurisdiction to Entertain the Instant Appeal.

Except for a few exceptions not material here, the right to appeal is limited to the situations authorized by Title 28, United States Code, Sections 1291 and 1292.

Wallace Products v. Falco Products, 242 F. 2d 958 (3rd Cir. 1957).

See:

Merino v. Hocke, 289 F. 2d 636 at 638 (9th Cir. 1961).

Section 1292 of Title 28 is limited to certain aspects of cases involving injunctions, receiverships, admiralty matters, and patent infringements, as well as certain cases in which a district judge states that he has the opinion that his order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The instant case does not fall within any of the subdivisions of Section 1292. Consequently, the right to appeal depends upon the applicability of Title 28, Section 1291, which reads as follows:

> "The courts of appeals shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court

> of the Virgin Islands, except where a direct review may be had in the Supreme Court." (Emphasis added).

Thus the question is whether the order appealed from was a "final decision." The order was a denial of an application for a writ of mandamus or order requiring a Commissioner's order "authorizing the taking of depositions" in Mexico (or in the alternative, the exercise of the Commissioner's discretion to determine whether he should grant an order "authorizing" the same).

The depositions presumably were desired for use in the extradition hearing, but the hearing was completed before the application was made to the district court for the writ of mandamus or order.

The district court order which is the subject of this appeal was not a "final decision" because it involved only a fragment of the entire proceeding. The basic controversy is presently embraced in appellant's *third* appeal, which is an appeal from the Order Dismissing Writ of Habeas Corpus, an attempted review of all aspects of the extradition hearing.

> "A case may not be brought up in fragments, but the decision appealed from must be final and complete, as to the subject-matter and as to the parties."
>
> *Cole v. Rustgard,* 68 F. 2d 316, at 316 (9th Cir. 1933).

Appellant's situation is essentially no different than it would have been if he had obtained the depositions and then was not permitted to introduce them into evi-

dence. In other words, appellant is essentially attempting to attack the equivalent of an *evidentiary* ruling by the trier of fact, *i.e.*, the Commissioner. However, a litigant may not appeal each adverse evidentiary ruling separately and by itself. Such a rule would permit hundreds of appeals in a lengthy case, imposing an intolerable burden upon the courts, interminable delays, and an overwhelming advantage to the litigant enjoying a financial superiority over his antagonist.

> "It is well settled that a case may not be brought here by writ of error or appeal in *fragments;* that to be reviewable a judgment or decree must be not only final, but complete, that is, *final* not only as to all the parties, but *as to the whole subject matter and as to all the causes of action involved;* and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."
>
> *Arnold v. Guimarian & Co.,* 263 U. S. 427, at 434 (1923) (Emphasis added).

> "Since the right to a judgment from more than one court is a matter of grace *and not a necessary ingredient of justice,* Congress from the very beginning has, *by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy,* set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial ad-

> ministration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. *Not until 1889 was there review as of right in criminal cases.*"
>
> *Cobbledick v. United States,* 309 U. S. 323, at 325 (1940). (Emphasis added)

Since appellant is concerned with a restriction upon his right to gather evidence, his situation is analogous to that of the litigant who unsuccessfully attempts to obtain a subpoena or compel production of books and documents or to obtain a physical examination. However, court orders interfering with these evidentiary quests are not appealable "final decisions."

> "It is perfectly clear that *a refusal to issue* a subpoena duces tecum or a refusal to quash one already issued is not an appealable decision."
>
> *National Nut Co. of California v. Kelling Nut Co.,* 134 F. 2d 532, at 533 (7th Cir. 1943). (Emphasis added.)

> "It is well settled that an order granting or *denying* a subpoena duces tecum for records and documents of a party bearing upon issues relevant in a pending action is not appealable."
>
> *Thomas French & Sons v. International Braid Co.,* 146 F. 2d 735, at 737 (5th Cir. 1945). (Emphasis added).

Denials of applications to compel production of books and documents or for leave to make a physical examination or for a *subpoena duces tecum* involve orders which are interlocutory, *not final.*

> *Cogen v. United States,* 278 U. S. 221, at 223-224 (1929).

An order *supressing the taking of depositions* is not an appealable final order.

> *Carolina Power and Light Company v. Jernigan,* 222 F. 2d 951 (4th Cir. 1955), cert. denied, 350 U. S. 837 (1955).

Appeal of these essentially evidentiary rulings merely serves to impose a needless burden upon courts and litigants.

> "A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete [citing cases]. And the rule requires that the judgment, to be appealable, should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved [citing cases]."
>
> *Collins v. Miller,* 252 U. S. 364, at 370 (1920).

To summarize, since the appeal does not attack a "final decision" and is not authorized by statute, it is respectfully submitted that this Court lacks jurisdiction and the appeal should be dismissed.

B. The Instant Appeal Involves No Question Affecting Appellant's Rights.

Appellant attempted to obtain a writ of mandamus directing the United States Commissioner, Los Angeles, California, to

> "(a) Make an order *authorizing* the taking of depositions in the Republic of Mexico by attorneys for the said Jaime J. Merino . . . and in the alternative,
>
> "(b) Exercise his discretion in determining whether or not the said Jaime J. Merino should be granted an order *authorzing* the taking of depositions in the Republic of Mexico."

In the alternative appellant attempted to obtain an order directing the Commissioner to perform the acts described in (a) and (b), above.

It would be gilding the lily to elaborate upon the obvious fact that a United States Commissioner in Los Angeles has no authority to require depositions in Mexico. Perhaps this is why appellant did not request an order *requiring* testimony at depositions to be taken in Mexico. Witnesses could refuse to attend, and the Commissioner could not compel them to attend.

However, appellant requested an order "authorizing" the taking of depositions. It is obvious that if the Commissioner had committed this idle act and authorized the taking of depositions, the legal situation of the parties would remain unchanged. The intended witnesses in Mexico could refuse to attend, just as effectively as they could refuse in the absence of a Commissioner's "authorization." The order requested by

appellant would then be no more effective than King Canute's command to the ocean tides to stop coming in.

Thus appellant cannot complain that the order was not made, because he suffered no harm. The appeal from the order of the district court contains an unmistakable aura of frivolity.

C. An Accused May Not Present Testimony by Foreign Witnesses in Extradition Proceedings.

In the unlikely event that this Court shall reach the merits of appellant's contention, it should be noted that the United States Supreme Court has already ruled upon the question which appellant attempts to raise and has held that there is no authority for receiving depositions of witnesses taken abroad.

> *Oteiza Y. Cortes v. Jacobus,* 136 U. S. 330, at 336-337 (1890).

It is interesting to note that while appellant attempts to raise an argument relating to due process of law under the United States Constitution, he is requesting more than the law permits for defendants in Federal criminal cases in the United States. A search of Federal statutes and rules reveals no authority for testimony by deposition at a preliminary examination, which is the nearest equivalent to an extradition proceeding. Rule 15(a) of the *Federal Rules of Criminal Procedure* provides for defense depositions under certain situations in the course of Federal prosecutions, but the Rule provides that the appropriate motion must be made "after the filing of an indictment or information. . . ." This precludes use of defense depositions at preliminary examinations.

Thus appellant, an alien, argues that it is a violation of due process of law to refuse to extend to him unusual privileges which are not enjoyed by citizens of the United States charged with the most serious Federal crimes!

An extradition proceeding does not involve a full presentation of all of the evidence.

> "To demand such evidence would be unjust to the fugitive, since it would amount to trying him twice for the same offence, and would send him before the foreign tribunals for trial under the adverse presumptions of a former conviction."
>
> 1 *Moore on Extradition,* p. 518.

> "In *In re Wadge,* 15 Fed. 864, 866, cited with approval in Charlton v. Kelly, supra, 461, the right to introduce evidence in defense was claimed; but Judge Brown said: 'If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction

of the accused upon a full and substantial trial here. . . .'"

Collins v. Loisel, 259 U. S. 309, at 316 (1922).

Extradition rules differ from the ordinary rules of criminal procedure. This is because the proceeding involves the vital interest of a foreign sovereign, the obligation of the United States Government to the foreign sovereign, and the potential effect, as a precedent, upon the interest of the United States when, with roles reversed, it may be seeking extradition. Solemn treaty obligations are involved which color every aspect of the proceeding.

In a unanimous decision the United States Supreme Court expounded upon the philosophy of extradition proceedings:

> "In the construction and carrying out of such treaties *the ordinary technicalities of criminal proceedings are applicable only to a limited extent.* Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. *They simply demand of him that he shall do what all good citizens are required, and ought to be willing to do, viz., submit themselves to the laws of their country.* . . . Presumably at least, no injustice is contemplated, and a proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and

good order of the community *is rather to be welcomed than discouraged.*"

Grin v. Shine, 187 U. S. 181, at 184-185 (1902) (Emphasis added).

Speaking for another unanimous court, Justice Holmes stated:

"It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. *But it is a waste of time.*"

Glucksman v. Henkel, 221 U. S. 508, at 512 (1911) (Emphasis added).

In a later opinion the Supreme Court emphasized the effect of extradition proceedings upon the problem of reciprocity:

"Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them." (at p. 293). The Court added:

"The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships, see 1 Moore, Extradition, § 40, should be construed more liberally than a criminal statute or the technical requirements of criminal procedure."

Factor v. Laubenheimer, 290 U. S. 276, at 298 (1933).

Since the extradition proceeding does not involve a trial, there are definite limitations upon the right of the accused to present evidence. The committing magistrate is concerned with the question whether there is evidence justifying extradition. He does not decide the question of innocence or guilt.

> *Collins v. Loisel, supra,* 259 U. S. 309, at 314-15 (1922).

The defendant cannot introduce evidence contradicting the demanding country's proof, establishing an alibi, showing insanity, or showing that the statute of limitations has run.

> *First National City Bank of New York v. Aristeguieta,* 287 F. 2d 219, at 226-27 (2nd Cir. 1960), cert. granted, 365 U. S. 840 (1961).

He is not entitled to introduce evidence which merely goes to his defense.

> *Jimenez v. Aristeguieta,* 311 F. 2d 547 (5th Cir. 1962).

He may not raise the defense of statute of limitations.

> *Hatfield v. Guay,* 87 F. 2d 358, at 364 (1st Cir. 1937), cert. denied, 300 U. S. 678 (1936).

In *Desmond v. Eggers,* 18 F. 2d 503 (1927), this Court upheld the act of an extradition committing magistrate in refusing to hear the accused's evidence that he was not in the foreign nation at the time of the commission of the alleged offense. A motion for stay of execution was denied. 274 U. S. 722 (1927).

A defendant does not have the right to procure depositions from a foreign country tending to show an alibi.

In re Wadge, 15 Fed. 864 (S. D. N. Y. 1883).

Even in the rare case in which an accused is allowed to present evidence at an extradition hearing, the wrongful exclusion of that evidence does not render the detention illegal.

Collins v. Loisel, supra, 259 U. S. 309, at 316 (1922).

Appellant cites Rule 15 of the *Federal Rules of Criminal Procedure,* providing for depositions in Federal criminal cases. However, the *Federal Rules of Criminal Procedure* are not applicable to extradition proceedings.

Rule 54(b)(5), *Federal Rules of Criminal Procedure.*

It appears that appellant is attempting to incorporate Rule 15 upon the basis of a statement in *Benson v. McMahon,* 127 U. S. 457, at 463 (1888), comparing extradition proceedings with preliminary examinations, and a statement in *Grin v. Shine, supra,* 187 U. S. 181, at 184 (1902), to the effect that extradition defendants have "the same defenses as others accused of crime within our own jurisdiction."

However, *Benson* merely repeated the oft-stated rule[1] that extradition proceedings are similar to *state* criminal proceedings.

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[1]Now open to some question, see *Application of D'Amico,* 185 F. Supp. 925 (S.D.N.Y. 1960).

See:

Wright v. Henkel, 190 U. S. 40, at 59 (1903);
Charlton v. Kelly, 229 U. S. 447, at 456 (1913);
Collins v. Loisel, supra, 259 U. S. 309, at 315 (1922).

Benson referred to *state* procedural rules, and Rule 15 of the *Federal Rules of Criminal Procedure* has nothing to do with state preliminary examinations. Furthermore, if the language in *Benson* ever sanctioned a procedure by which Rule 15 could be applicable to extradition proceedings, which is not conceded, then Rule 54(b)(5) subsequently altered the situation.

While *Grin* states that accused fugitives have the same defenses as others accused of crimes, it also holds (at p. 184) that "*the ordinary technicalities of criminal proceedings are applicable only to a limited extent.*" Furthermore, it is well to note the defenses of "others accused of crime within our own jurisdiction." There is no absolute right to a preliminary examination, as there may be an indictment in lieu of preliminary examination.

Boone v. United States, 280 F. 2d 911 (6th Cir. 1960).

In *Charlton v. Kelly, supra,* 229 U. S. 447, at 462 (1913), in rejecting an accused's argument that he should have been allowed to present evidence in extradition proceedings, the Supreme Court mentioned the somewhat analogous rights of American defendants in grand jury proceedings:

"A defendant *has no general right to have evidence exonerating him go before a grand jury,*

> and unless the prosecution consents, *such witnesses may be excluded.*"

It is apparent that appellant rests his case upon Rule 15, rather than any alleged common-law right to obtain depositions. Appellant states: "Petitioner seeks an order to take depositions under *statutory* authority and procedure." Appellant's Opening Brief, page 7 (emphasis added). However, for the reasons mentioned above, Rule 15 does not provide that authority.

D. Even if the Accused Had the Right to Obtain Foreign Depositions, Denial of That Quest Is Not Subject to Review.

It is not conceded that appellant had the right to obtain foreign depositions. However, if he had the right, the denial thereof had no greater effect than a ruling excluding evidence. As noted above, wrongful exclusion of evidence in extradition proceedings does not render the detention illegal.

> "It is clear that the mere wrongful exclusion of specific pieces of evidence, *however important,* does not render the detention illegal."
>
> *Collins v. Loisel, supra,* 259 U. S. 309, at 316 (1922), (emphasis added).

In the recent 1962 decision in *Jimenez v. Aristeguieta, supra,* 311 F. 2d 547, at 556, the 5th Circuit ruled that the committing magistrate *need not read defense testimony introduced* by exhibit, which was the chief source of evidence in that case.

The Government submits that refusal to *allow* depositions would be no more erroneous than refusal to *read* depositions.

E. The Order Which Appellant Requested From the District Court Would Have Had No Legal Effect if Granted.

After the Commissioner found appellant extraditable, appellant moved the District Court for the writ of mandamus or order involved in the instant appeal, directing the Commissioner to authorize the taking of depositions, etc. If the writ or order had been granted and appellant had taken depositions, what would he do with them? The extradition hearing had been completed. The writ or order would have had no legal effect. If, by some unusual legal theory, appellant hoped to have the proceedings reopened, he failed to make such a request. If the District Court committed error, which is not conceded, appellant's rights were not affected. There being no injury, the appeal is not meritorious.

F. Appellant Had No Right to Depositions Under 18 U. S. C. A. 3191 or Rule 26, Federal Rules of Civil Procedure.

Appellant contends that he had the right to obtain depositions under Title 18, United States Code, Section 3191. Section 3191 requires an affidavit to the effect that the accused is an indigent. No such affidavit was filed in the instant case, so Section 3191 is not applicable.

Appellant's argument is identical to the contentions rejected in the recent *Jimenez* decision, *supra,* in which it was held that Section 3191 of Title 18 does not ap-

ply to depositions, as it is concerned only with subpoenas.

Jimenez v. Aristeguieta, supra, 311 F. 2d 547 (5th Cir. 1962).[2]

Jimenez also holds that the provisions of Section 3190 of Title 18 (foreign depositions) do not apply to defense attempts to obtain depositions.

Appellant also cites Rule 26 of the *Federal Rules of Civil Procedure.* It does not appear that appellant raised this point in his memorandum of "Points and Authorities" filed herein with the District Court in April, 1962. A matter not presented to a lower court should not be considered upon appeal.

Libbey-Owens-Ford Glass Co. v. Sylvania Indust. Corp., 154 F. 2d 814, at 816 (1946), cert. denied, 328 U. S. 859 (1946).

Furthermore, it is highly doubtful that the *Rules of Civil Procedure* apply in extradition proceedings. Appellant's Opening Brief (p. 7) states that extradition proceedings have been referred to by the Supreme Court as being of a *criminal* nature (citing cases). It would be a patent inconsistency to apply the Federal Rules of *Civil* Procedure to a *criminal* case.

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[2]In connection with this argument appellant adds observations regarding his diligence in attempting to secure depositions: "The appellant herein has promptly and diligently sought to secure the depositions in this case and has not been dilatory in any particular." (Appellant's Opening Brief, p. 17.) Again: "These are not belated efforts of the accused, but prompt and continuous requests which have been denied." (Appellant's Opening Brief, p. 18.) Appellant applied for the writ and order involved in this appeal on December 27, 1961, more than half a year after Commissioner Hocke entered an order finding appellant extraditable. The first appeal was dismissed on April 26, 1961.

There is, of course, no guarantee that witnesses would appear for deposition under Rule 26, or would testify. In addition, it is noteworthy that most of the intended witnesses were not in prison, so Rule 26(a) would apply: "After commencement of the action, the deposition may be taken *without leave of court.* . . ." (Emphasis added). Consequently, appellant may not rely upon Rule 26, *Federal Rules of Civil Procedure.*

G. Appellant Had No Right to Letters Rogatory or a Commission.

Appellant quotes (without comment) Title 28, United States Code, Section 1781, involving letters rogatory and commissions. Appellant did not request letters rogatory. Furthermore, a showing that a commission is not adequate is a prerequisite to issuance of letters rogatory.

Gross v. Palmer, 105 Fed. 833.

No such showing was made.

H. There Was No Violation of Due Process of Law.

Appellant alleges a violation of due process of law and cites a number of cases in which the rights of criminal defendants have been expanded. However, the fact that these rights have been expanded is no argument for additional expansion.

It is manifestly incongruous for appellant, an alien, to claim a violation of due process in not being allowed to present evidence in a preliminary proceeding, when an American citizen has no right to present evidence before a Grand Jury, where preliminary proceedings in federal criminal cases are normally handled.

It is equally strange for appellant to claim a violation of due process in not being able to obtain evidence, when the committing magistrate *is not even required to examine defense evidence* (*Jimenez, supra,* 311 F. 2d 547, at 556).

VI.
CONCLUSION.

The order of the District Court should be affirmed for *each* of the following reasons:

1. This Court lacks jurisdiction to entertain the instant appeal.
2. The requested writ and order would not have had any effect upon witnesses not already willing to voluntarily testify.
3. An accused may not present depositions of foreign witnesses in extradition proceedings.
4. The requested depositions would involve unreasonable delays in the proceedings.
5. Wrongful exclusion of evidence in an extradition hearing, if such occurred, is not subject to judicial attack.
6. Appellant requested a useless writ or order, as the extradition proceedings had been completed.
7. There was no violation of due process of law.

It is respectfully submitted that the order of the District Court should be affirmed.

Respectfully submitted.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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